UNITED STATES OF AMERICA	)	
	)	**Prosecution Response**
v.	)	
	)	**to Defense Motion for Appropriate Relief**
Manning, Bradley E.	)	**Under Military Rule of Evidence 505**
PFC, U.S. Army,	)	
HHC, U.S. Army Garrison,	)	
Joint Base Myer-Henderson Hall	)	**8 March 2012**
Fort Myer, Virginia 22211	)	

RELIEF SOUGHT

The United States respectfully requests the Court deny, in part, the Defense Motion for Appropriate Relief under Military Rule of Evidence (MRE) 505 (the "Motion") and the Defense Supplement to the Motion (the "Supplement") for the reasons provided herein. The United States requests oral argument.

BURDEN OF PERSUASION AND BURDEN OF PROOF

As the moving party, the Defense bears the burden of persuasion and must prove any factual issues necessary to decide this motion by a preponderance of the evidence. See Manual for Courts-Martial, United States, R.C.M. 905(c) (2008).

FACTS

The United States agrees to those facts cited by Defense in its Motion and Supplement, except for any allegations that the referenced classification determination fails to comply with Executive Order No. 13526, that the organization's public statements are "inconsistent" with the classification determination, or that question the interpretation of the classification determination.

WITNESSES/EVIDENCE

The United States does not request any witnesses or evidence be produced for this response.

LEGAL AUTHORITY AND ARGUMENT

The United States respectfully requests the Court deny Defense request for the following: (1) an Article 39(a) session for the purpose of obtaining "clarification" from a referenced Original Classification Authority (OCA); (2) issuance of the Defense's proposed Protective Order ("Defense's PO"); (3) the production of the referenced OCA as a witness; (4) the production of Mr. Jay Prather, Court Security Officer, as a witness; and (5) the Defense's proposed Protective Order to the Court Security Officer.

I: THE UNITED STATES REQUESTS THAT THE COURT HOLD AN ARTICLE 39(a) SESSION UNDER THE GUIDANCE OF MRE 505(e).

The United States supports Defense request, in part, for an Article 39(a) session. MRE 505(e) states that "after referral of charges and prior to arraignment, any party may move for a session under Article 39(a) to consider matters relating to classified information that may arise in connection with the trial." M.R.E. 505(e). Otherwise, the Rule continues that

> *sua sponte*, the military judge promptly shall hold a session under Article 39(a) to establish the timing of requests for discovery, the provision of notice under subdivision (h), and the initiation of the procedure under subdivision (i). In addition, the military judge may consider any other matters that relate to classified information or that may promote a fair and expeditious trial.

Id. In its Motion, the Defense requested that the Court hold an Article 39(a) session to "issue a Protective Order under MRE 505(g)(1), establish timing for discovery and notice under MRE 505(h), and obtain clarification from the OCA for Specification 3 and 15 of Charge II." The United States supports Defense request for an Article 39(a) session, *but not* for the purpose of obtaining "clarification" from the referenced OCA. As outlined below in section (IV), the United States respectfully requests that the Court deny production of the OCA as testimony that is not "relevant and necessary" and outside the spirit of MRE 505(e). See R.C.M. 703(b); see also M.R.E. 505(e) (to establish the timing of discovery requests, MRE 505(h) provisions, and MRE 505(i) procedures).

II: THE UNITED STATES REQUESTS THAT THE COURT DENY DEFENSE'S PROPOSED PROTECTIVE ORDER.

The United States respectfully requests that the Court deny Defense's PO because it contains countless legal and factual errors and violates the spirit of MRE 505(g)(1).

A major concern in Defense's PO is the role of the Court Security Officer (CSO), namely that the CSO absorbs duties designed for the Trial Counsel and the Security Experts assigned to the Defense. For example, Defense's PO assigns the CSO with many responsibilities ordinarily assigned to the Trial Counsel, including, *inter alia*, the following: (1) verifying and processing security clearances; (2) coordinating the purchase of equipment for the Defense; (3) coordinating the designation of areas for classified communication; and (4) coordinating the designation of a storage facility for the storage, handling, and control of classified information. See Defense Motion, para. 3(c)(4), 3(h)(2), 3(h)(3)(A), 3(k), 3(n)(4), 3(n)(5), 3(n)(6). Additionally, Defense's PO assigns the CSO with responsibilities of the United States Army, Deputy Chief of Staff for Intelligence, namely giving the civilian defense counsel access to classified information and approving any mechanical devices used in the preparation or transmission of classified information. See Defense Motion, para. 3(i), 3(n)(6). Requiring the CSO to absorb all of these tasks, in conjunction with those duties necessary to properly and timely assist the Court, may cause future delays, in addition to unnecessary burden an expert upon whom the parties and the Court rely heavily.

Outside clerical errors, Defense's PO also, *inter alia*, improperly defines its scope, fails to include all defense members such as security experts detailed to the defense, contains information relating to MRE 505(h) which is more proper in a separate order, narrowly defines "Government intelligence employees," and fails to include any restrictions on the accused's access to classified discovery.[1] See Defense Motion, para. 3(a), 3(c)(6), 3(h)(3), 3(m), 3(n)(12).

The Defense's PO violates the spirit of MRE 505(g)(1). "If the Government agrees to disclose classified information to the accused," the rule requires the military judge to enter an appropriate protective order "at the request of the Government." M.R.E. 505(g)(1) ("the military judge, *at the request of the Government*, shall enter an appropriate protective order to guard against the compromise of the information disclosed *to the accused*") (emphasis added)). The rule is intended to protect that information which the Government agrees to disclose to the accused. Accordingly, the United States respectfully requestd that the Court enter a protective order, but only at the request of the United States who, on behalf of the Government, has agreed to provide defense access to classified information. See id.

The United States respectfully requests that the Court deny Defense's PO in light of these concerns.

III: THE UNITED STATES REQUESTS THAT THE COURT DENY DEFENSE REQUEST FOR THE PRODUCTION OF THE OCA.

The United States respectfully requests the Court deny Defense request for the production of the OCA relating to Specification 3 and 15 of Charge II. Defense requests the production of this witness to "obtain clarification...regarding the scope of its classification determination on referencing the OCA within court filings and open court." Such anticipated testimony, however, is not legally "relevant and necessary." See R.C.M. 703(b).

RCM 703(b) states that "[e]ach party is entitled to the production of any witness whose testimony on a matter in issue on the merits...would be relevant and necessary." R.C.M. 703(b); see also R.C.M. 401 (relevant evidence "means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence"); see also R.C.M. 703(b) discussion ("[r]elevant testimony is necessary when it is not cumulative and when it would contribute to a party's presentation of the case in some positive way on a matter in issue"). The rule does not govern the production of classified information. See R.C.M. 701(f); see also R.C.M. 703(f) analysis; see also Manual for Courts-Martial, United States, Mil. R. Evid. 505(a) ("this rule applies to all stages of the proceedings").

Information may be originally classified only if done so by an Original Classification Authority (OCA). Executive Order 13526 § 1.1(a). Additionally, the information must be owned by, produced by or for, or under the control of the United States Government and must fall within one or more of the following categories: military plans, weapons systems, or operations; foreign government information; intelligence activities (including covert action),

[1] See Defense Motion, para. 3(c)(1)(A-B) (Executive Order 13526).

intelligence sources or methods, or cryptology; foreign relations or foreign activities of the United States, including confidential sources; scientific, technological, or economic matters relating to the national security; United States Government programs for safeguarding nuclear materials or facilities; vulnerabilities or capabilities of systems, installations, infrastructures, projects, plans, or protection services relating to the national security; or the development, production, or use of weapons of mass destruction. See Executive Order 13526 §§ 1.1(a), 1.4(a)-(h). Finally, the OCA must determine determine "that the unauthorized disclosure of the information reasonably could be expected to result in damage to the national security" and be able to identify or describe the expected damage. See Executive Order 13526 § 1.1(a) (emphasis added).

OCAs make their classification designations based on their authority under Executive Order 13526, Classified National Security Information (signed by President Barack Obama on 29 December 2009) or for materials classified prior to 27 June 2010 on Executive Order 12958 (signed by President Clinton on 17 April 1995 and amended by Executive Order 13292 signed by President Bush on 25 March 2003), as well as relevant classification guides.

The authority to classify information is limited to (1) the President and the Vice President; (2) agency heads and officials designated by the President; and (3) United States Government officials delegated this authority pursuant to paragraph (c) of section 1.3(a). See Executive Order 13526 § 1.3(a).

The President delegated the authority to make classification determinations to heads of selection agencies and it remains an Executive function. Department of Navy v. Egan, 484 U.S. 518, 527 (1988) ("The authority to protect [classified] information falls on the President as head of the Executive Branch and as Commander in Chief."). The authority has been held in the relevant agencies because they have the expertise to review the information and determine the potential impact the release of that information would have on the United States as well as who can have access to that information. Id.; see, e.g., CIA v. Sims, 471 U.S. 159, 176 (1985) ("[A] court's decision whether an intelligence source will be harmed if his identity is revealed will often require complex political, historical, and psychological judgments. . . . There is no reason for a potential intelligence source, whose welfare and safety may be at stake, to have great confidence in the ability of the judges to make those judgments correctly.").

Once an OCA has made a classification determination it is presumed proper and it is not the province of the court to question these determinations. See United States v. Smith, 750 F.2d 1215, 1217 (4th Cir. 1984) ("[T]he government . . . may determine what information is classified. A defendant cannot challenge this classification. A court cannot question it."), vacated and remanded on other grounds, 780 F.2d 1102 (4th Cir. 1985); see also United States v. Rosen, 487 F. Supp. 2d 703, 717 (E.D. Va. 2007) ("Of course, classification decisions are for the Executive Branch . . . ."). The decision of the owner of the information must be given great deference. See Sims, 471 U.S. at 176 ("The decisions of the Director, who must of course be familiar with 'the whole picture,' as judges are not, are worthy of great deference given the magnitude of the national security interests and potential risks at stake"); see also Haig v. Agee, 453 U.S. 280, 291 (1981) ("Matters intimately related to foreign policy and national security are rarely proper subjects for judicial intervention"); see also Harisiades v. Shaughnessy, 342 U.S.

580 (1952) (such matters "are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference").

In sum, the Defense has failed to articulate why the anticipated testimony of the referenced OCA is "relevant and necessary." See R.C.M. 703(b). The witness' anticipated testimony, specifically to "obtain clarification...regarding the scope of its classification determination on referencing the OCA within court filings and open court," is not "relevant and necessary," but instead simply requested to assist the Defense in safeguarding classified information.

IV: THE UNITED STATES REQUESTS THAT THE COURT DENY DEFENSE REQUEST FOR THE PRODUCTION OF MR. JAY PRATHER, THE COURT SECURITY OFFICER.

The United States respectfully requests the Court deny Defense request for the production of Mr. Jay Prather, the Court Security Officer. Defense articulates *no basis* for why his testimony is "relevant and necessary." See R.C.M. 703(b). The United States can envision no reason why Mr. Prather's testimony would be "relevant and necessary" with respect to the matters regarding MRE 505(h) or MRE 505(i). The United States can only assume that Defense requests Mr. Prather's testimony regarding the language of the Protective Order. Assuming, *arguendo*, this is the case, Mr. Prather's testimony again is not "relevant and necessary." See R.C.M. 703(b). The United States agrees with Defense's assumed position that the Court should receive guidance from Mr. Prather; however, it is recommended that the Court consult with Mr. Prather *ex parte*, if it should have any questions regarding the language of the Protective Order. Subjecting Mr. Prather to sworn, in-court testimony is unnecessary and inefficient.

V: THE UNITED STATES REQUESTS THAT THE COURT DENY DEFENSE'S PROPOSED PROTECTIVE ORDER TO THE COURT SECURITY OFFICER.

The United States respectfully requests that the Court deny Defense's proposed Protective Order to the Security Officer. The proposed Order is flawed given the many unnecessary and inefficient procedures set forth therein and Defense's overly broad interpretation of the CSO's role, as outlined above. See Defense's proposed Protective Order to: Security Officer, para. 3(c) (prohibiting the CSO from divulging the contents of any *ex parte* filings to any person when, if classified information is contained therein, the CSO will be required to consult with the applicable OCA; 3(d) (regardless of classification, requiring the CSO to provide the Court and the defense a written declaration for all filings, an unnecessary measure that may cause delay), 3(e) (requiring the CSO to alert Defense if its filings are unclassified before filings are submitted to the Court, an unnecessary measure that may cause delay). The Protective Order proposed by the United States eliminates the need for a separate Protective Order for the CSO.

CONCLUSION

Based on the above, the United States requests that the Court deny, in part, the Defense Motion for Appropriate Relief under MRE 505 and the Defense Supplement to the Motion.

ASHDEN FEIN
CPT, JA
Trial Counsel

I certify that I served or caused to be served a true copy of the above on Defense Counsel, via electronic mail, on 8 March 2012.

ASHDEN FEIN
CPT, JA
Trial Counsel